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ABSTRACT

This document is one of six discussion papers prepared for the Wisconsin Legislative Council's Special Committee on Crimes Against Children. The introduction explains the committee's task of conducting a thorough examination of state laws relating to crimes against children, reviewing major policy issues affecting those laws to determine whether substantive changes are needed in various statutory provisions and reorganizing the laws. This paper deals specifically with crimes involving sexual morality. It is divided into five parts which address the issues of: (1) incest; (2) enticement of a child for immoral purposes; (3) fornication, sexual gratification, and lewd and lascivious behavior; (4) obscenity and exposure of minors to harmful materials; and (5) soliciting prostitutes. For each of these issues, there is a section explaining current law and a section giving suggestions for statutory revisions. Copies of the statutes covered in the report, arranged in numerical order, and a copy of ss. 939.50 to 939.52, which prescribe the basic criminal penalty classification system used in the Criminal Code are appended. (NB)

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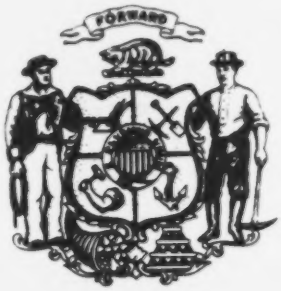

CRIMES AGAINST CHILDREN
B. SEXUAL MORALITY

DISCUSSION PAPER 86-1B

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Wisconsin Legislative Council Staff — Madison, Wisconsin

Special Committee on Crimes Against Children — August 15, 1986

DISCUSSION PAPER 86-1B*

CRIMES AGAINST CHILDREN .

B. SEXUAL MORALITY

INTRODUCTION

Discussion Paper 86-1B is the second of a series of Discussion Papers that will be prepared for the Legislative Council's Special Committee on Crimes Against Children. The Special Committee is conducting a thorough examination of state laws relating to crimes against children, including:

1. Reviewing major policy issues affecting these laws to determine whether substantive changes are needed in such statutory provisions as abuse of children; sexual assault; child enticement; lewd and lascivious conduct; abduction; incest; abandonment; and others.

2. Reorganizing these laws, to the extent appropriate, so that like provisions are logically grouped; ambiguities and conflicts in the present laws are reconciled; and relevant Supreme Court and Court of Appeals decisions and Attorney General opinions are codified.

The Special Committee review will be based, in part, on a project undertaken, at the request of Senator Barbara Ulichny, by the University of Wisconsin-Madison Law School and Extension. This project resulted in a preliminary draft proposal entitled "Crimes Against Children: A Proposed Chapter of the Wisconsin Statutes" (July 1985), prepared by Attorney Ronni G. Jones, under the supervision of a Law School/Extension faculty advisory committee. The draft proposal (hereafter referred to as the Law School Proposal) suggests certain policy changes in various statutes relating to crimes against children and suggests the creation of a separate chapter of the statutes on crimes against children, organized by "the interest of the child sought to be protected."

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*This Discussion Paper was prepared by Pam Russell, Staff Attorney, Legislative Council Staff.

For Special Committee discussion purposes, the issues and statutes to be examined will be grouped into the following separate Discussion Papers which will describe the statutes under discussion and summarize suggestions for changes in these statutes:

Discussion Paper 86-1A: Physical and Psychological Abuse: The Paper will cover ss. 940.201, abuse of children; 940.203, sexual exploitation; and 940.225, sexual assault.

Discussion Paper 86-1B: Sexual Morality: The Paper will cover ss. 944.06, incest; 944.12, enticement for immoral purposes; 944.15 fornication; 944.17, sexual gratification; 944.20, lewd behavior; 944.21, obscenity; 944.25, exposure to harmful materials; and 944.32, soliciting prostitutes.

Discussion Paper 86-1C: Physical Neglect: The Paper will cover ss. 940.27, failure to support; 940.28, abandonment of a young child; and 940.29, abuse of residents of facilities.

Discussion Paper 86-1D: Interfering With Custody: The Paper will cover ss. 940.32, abduction; 946.71, interference with custody of child; 946.715, interference by parent with parental rights of other parent; and 946.716, unauthorized placement for adoption.

Discussion Paper 86-1E: Contributing to Delinquency of a Minor: The Paper will cover ss. 947.15, contributing to delinquency; 947.08, crime comics; 125.07, serving alcohol beverages to minor; 161.46, distributing drugs to minor; 943.34, receiving stolen property from minor; and 946.46, encouraging probation or parole violation.

Discussion Paper 86-1F: Regulatory Offenses Directed at Children: The Paper will cover ss. 103.19 to 103.32 and 103.64 to 103.86, employment regulations; 118.13, pupil discrimination; 146.01, infant blindness; 151.03, lead poisoning; 444.09 (4), boxing exhibitions; 940.26, hazing; 941.22, furnishing a pistol to a minor; 942.02, strip search by school employe; 946.63, concealing death of a child; and 943.35, receiving property from a child.

Discussion Paper 86-1B is organized as follows: Part I discusses incest; Part II discusses enticement of a child for immoral purposes; Part III discusses fornication, sexual gratification and lewd and lascivious behavior; Part IV discusses obscenity and exposure of minors to harmful materials; Part V discusses soliciting prostitutes; and the Appendix contains copies of the statutes covered in the Discussion Paper, arranged in numerical order, plus a copy of ss. 939.50 to 939.52, which prescribe the basic criminal penalty classification system used in the Criminal Code.

PART I

INCEST

A. EXPLANATION OF CURRENT LAW

1. Description of Incest Statute and Related Statutes

The incest statute, s. 944.06, Stats., prohibits any person from marrying or from having nonmarital sexual intercourse with a known blood relative who is related "in a degree within which the marriage of the parties is prohibited" by law. The law referred to is s. 765.03 (1), Stats., which prohibits persons who are nearer in relation than second cousin from marrying. The incest statute does not make any age distinctions; it applies to minors and adults alike. Violation of the incest statute is a Class C felony (punishable by a fine of up to $10,000 or imprisonment not to exceed 10 years, or both).

"Sexual intercourse," for purposes of the incest statute and other crimes in the Criminal Code, is defined to require "only vulvar penetration and does not require emission" [emphasis added; s. 939.22 (36), Stats.]. A more comprehensive definition of "sexual intercourse," which is used in the sexual assault statute, is not applicable to the incest statute. The definition used in the sexual assault statute is as follows:

> "Sexual intercourse" includes the meaning assigned under s. 939.22 (36), as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required [s. 940.225 (5) (b), Stats.].

Under s. 971.37, Stats., in lieu of immediate prosecution for violation of the incest statute, a district attorney may enter into a deferred prosecution agreement with the person accused of incest where the alleged victim is a minor. Under the deferred prosecution agreement, the accused person waives his or her right to a speedy trial and agrees to comply with conditions specified in the agreement. These conditions may include receiving counseling or treatment under the ongoing supervision of the district attorney's office or an assigned case worker.

The underlying purpose of the deferred prosecution statute, as envisioned by the authors, is to use the threat of criminal prosecution to

get the alleged offender into treatment programs while keeping the family unit intact, within the discretion of the district attorney. The alleged victim and the victim's parents are informed of the agreement. If the agreement is complied with, the person accused of committing incest is not prosecuted.

If it appears that the crime of incest has occurred, the prosecutor has the option of charging either incest or, depending on the age of the victim, first or second degree sexual assault or fornication. Unlike incest, the crimes of sexual assault and fornication do not require the victim to be a blood relative or require proof that the perpetrator knew of the blood relationship with the victim [ss. 940.225 (1) (d) and (2) (e) and 944.15, Stats.].

2. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no relevant court decisions or other interpretations of s. 944.06, Stats.

B. SUGGESTIONS FOR STATUTORY REVISIONS

1. Victims

a. Background

The current incest statute prohibits marriage or acts of sexual intercourse only between persons related by blood nearer in degree than second cousins, regardless of age. The current incest statute does not prohibit persons who live in the same household in a nonmarital relationship from having sexual intercourse with minors of that household, nor does it prohibit sexual intercourse between persons, including minors, related by adoption or marriage (i.e., by affinity).

The Law School Proposal suggests expanding the types of perpetrators who may be charged under the incest statute to include persons other than blood relatives who, if they have sexual contact* with a minor, are likely

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* The use of the term "sexual contact" is broader than the term "sexual intercourse" currently used in the incest statute; this issue is discussed below under Part I, B, 2.

to cause a different type of emotional damage to the minor than are strangers who may currently be charged under the sexual assault statute. The Proposal suggests that the incest statute include persons who have various types of relationships with or positions of authority over the minor victim. There are a number of ways to define this group of perpetrators; the remainder of this discussion focuses on three different approaches.

(i) The Law School Proposal. The Law School Proposal suggests adding a provision to the incest statute specifically relating to minors, under which sexual contact with a minor is prohibited when the person performing the act of sexual contact lives in a familial relationship with the minor or is related to the minor by affinity to the second degree. The Proposal defines "familial relationship" as "the relationship that exists among people when they live together as a family unit. A familial relationship is not dependent on blood or legal ties." The Proposal does not define "relation by affinity."

The comment accompanying the Law School Proposal indicates that what is meant to be included under "familial relationships" are live-in "significant others" of the person responsible for the minor's welfare and under "affinity" adoptive families, step families and foster families.

(ii) Minnesota Statute. The Minnesota counterpart to the Wisconsin incest statute is the intrafamilial sexual abuse law, ss. 609.364 to 609.36644, Minn. Stats. Under that law, "intrafamilial sexual abuse" is defined to mean sexual contact or sexual penetration, or both, of a minor when the perpetrator has a familial relationship with the complainant. "Familial relationship" is broadly defined to mean a situation in which the perpetrator is:

> (a) The complainant's parent, stepparent, or guardian;
>
> (b) Any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt; or
>
> (c) An adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant's spouse.

The Minnesota statute provides for different degrees of penalties based on: (i) whether the victim is a "child" (i.e, under age 16) or a

"minor" (i.e, 16 or 17 years of age); and (ii) whether sexual contact or sexual penetration is involved.

(iii) The Deferred Prosecution Statute. Under Wisconsin's deferred prosecution statute, described in Part I, A, above, if sexual contact between a person and a minor takes place, the criminal charge may be treated differently than a sexual assault if the person is related by blood to the minor or:

(a) The person lives with or has lived with the minor;

(b) The person is a guardian or legal custodian of the minor; and

(c) The person is or appears to be in a position of power or control over the minor.

b. Suggestions

The Special Committee could consider creating a separate category of incest involving minor victims and broadening the types of relationships which would constitute incest where minor victims are involved. The types of relationships that could be specified include:

(i) Using general terms such as "familial relationships" and "related by affinity," as suggested in the Law School Proposal;

(ii) Using more specific descriptions of these types of relationships, such as the definition used in the Minnesota intrafamilial sexual abuse statute; or

(iii) Using the types of relationships used in the deferred prosecution statute, s. 971.37, Stats., which include a guardian or legal custodian.

If the Special Committee decides to create a separate incest provision specifically applicable to victims who are minors, the Committee could also consider whether penalties for incest involving minors should be the same as, or higher than, incest involving only adults.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: ss. 960.02 (5), Definitions, and 960.50 (1), Committing Incest With a Child.]

2. Sexual Contact

a. Background

As indicated in Part I, A, the current incest statute prohibits only marriage or sexual intercourse between blood relatives. Since "sexual intercourse" is not separately defined for the crime of incest, the general meaning applies [vulvar penetration with or without ejaculation; s. 939.22 (36), Stats.].

The Law School Proposal suggests that, in cases where the incest victim is a minor, other types of sexual contact, in addition to sexual intercourse, should be prohibited where they are harmful to the minor. The Proposal would define "sexual contact" based on the present definition of sexual contact under s. 940.225 (5) (a), Stats., governing sexual assaults. The Criminal Code definition is shown below, with the present language which is deleted by the Proposal shown as ~~stricken~~.

> "Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant ~~or if the touching contains the elements of actual or attempted battery under s. 940.19 (1)~~.

b. Suggestions

The Special Committee could consider creating a separate category of incest involving sexual contact in the current category of incest involving sexual intercourse. In considering whether to add this separate category, the Committee could consider creating different levels of penalties for the offense of incest, under which sexual intercourse would carry a more severe penalty than other types of sexual contact.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.50 (1), Committing Incest With a Child.]

3. Aiding and Abetting

a. Background

Under the current incest statute, only a person who marries or has nonmarital sexual intercourse with a person known to be a close blood relative may be convicted of incest. The incest statute does not specifically prohibit conduct which may result in another person committing incest. However, a general provision in the Criminal Code does permit criminal charges to be brought against any person who is concerned in the commission of a crime by "intentionally aiding and abetting the commission of the crime" [s. 939.05 (2) (b), Stats.]. This general provision applies to the crime of incest.

The "aiding and abetting" provision in the Criminal Code has been construed by the courts to require a showing that: (i) the defendant undertook conduct that, as a matter of objective fact, aided another in the execution of a crime; and (ii) the defendant consciously desired or intended that his or her conduct would yield such assistance [State v. Hecht, 116 Wis. 2d 605 (1984)].

The Hecht decision's interpretation of aiding and abetting was found to apply in a subsequent case involving a mother who, the Court concluded, had repeatedly aided her husband in abusing her children by leaving the children with her husband and failing to intervene to stop the abuse, despite her actual knowledge of a pattern of abuse by her husband during her absences [State v. Williquette, 124 Wis. 2d 86 (Ct. App. 1985), affirmed on other grounds, 129 Wis. 2d 239 (1986)]. This interpretation of "aiding and abetting," in the context of the crime of child abuse, is equally applicable to aiding and abetting in the crime of incest. Thus, it is likely that a court would conclude that a conscious desire or intent to aid another in committing the crime of incest would be shown by actual knowledge of the likelihood that incest would occur if certain action were taken.

The Law School Proposal suggests including a new "aiding and abetting" provision in the incest statute, without changing the current aiding and abetting provision in s. 939.05, Stats. Under the Proposal, a parent or other person responsible for a child's welfare would be guilty of incest, if that person: (i) has knowledge that another person has had or intends to have sexual intercourse or sexual contact with a minor; (ii) is capable of taking action which would prevent the intercourse or contact from occurring or being repeated; and (iii) fails to take that action. This proposed language differs from the general aiding and abetting provision in the Criminal Code, as construed by the Wisconsin Court of Appeals, because it focuses on the failure to act, rather than on the active conduct or promotion of the crime of incest.

b. Suggestions

The Special Committee could consider amending the current incest statute to cover the knowing failure of a parent or guardian to prevent incest involving the parent's child and another person, rather than relying solely on the general "aiding and abetting" statute.

The Committee could also consider whether the Court of Appeals' decision in Williquette should be codified, so that the incest statute would expressly prohibit a parent from undertaking active conduct to put one's children in a position which would predictably result in incest.

In considering adding an amplified aiding and abetting provision in the incest statute, either in the sense of active conduct or in the sense of failure to act, the Special Committee could consider whether this crime should carry the same penalty as incest by sexual intercourse (a Class C felony) or a lesser penalty.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.50 (2), Committing Incest with a Child.].

4. Time Limitations for Prosecution

a. Background

Under Wisconsin's general criminal statute of limitations, prosecutions for felonies must be commenced within six years and prosecutions for misdemeanors within three years of the illegal conduct. Therefore, prosecutions of incest, a Class C felony, must be brought within six years of a specific act of incest for the perpetrator to be convicted on the basis of that act [s. 939.74 (1), Stats.].

In some other states, longer limitation periods exist for crimes involving young victims, including the crime of incest (and, often, sexual assault and child abuse), in the following forms:

(i) A longer fixed limitation period is provided, such as in Minnesota where the limitation on prosecution is extended to eight years when a minor victim is involved;

(ii) A type of "discovery" rule is established, such as in Illinois, where the prosecuting officer may bring a criminal action up to one year after the officer becomes aware of the crime or within a fixed limitation period, whichever is longer; and

(iii) A statute of limitations, based on the age of the victim is provided, such as in Nevada, where criminal acts of incest involving family members may be prosecuted either up to one year after the victim reaches the age of 18, or within a fixed limitation period, whichever is longer.

b. Suggestions

The Special Committee could consider extending the time limitation on prosecutions for incest (and, possibly, other crimes involving minors) where family members are involved by:

(i) Extending the current six-year limitation on felony prosecutions to a longer fixed period (e.g., eight years);

(ii) Maintaining the current general six-year limitation and also provide a longer period within which an incest action can be brought by allowing prosecutions up to one year after the victim reaches the age of, say, 18; or

(iii) Providing an exception to the six-year limitation that would allow prosecutions up to either one year after the criminal conduct of incest has been brought to the attention of the district attorney, or a fixed period of years, whichever is longer.

PART II

ENTICING A CHILD FOR IMMORAL PURPOSES

A. EXPLANATION OF CURRENT LAW

1. Description of Child Enticement Statute and Related Statutes

Under the child enticement statute, any person 18 years of age or older who persuades or entices any minor under the age of 18 years into a vehicle, building, room or secluded place with the intent to commit an act which would constitute a crime against sexual morality is guilty of a Class C felony (punishable by a fine of up to $10,000, imprisonment of up to 10 years, or both) [s. 944.12, Stats.]. The actual commission of an intended act which is a crime against sexual morality is a separate offense from the act of enticement under s. 944.12, Stats. A person may be charged with and convicted of both enticement and commission of a completed act against sexual morality.

In addition to the criminal penalty for child enticement, the Motor Vehicle Code contains provisions relating to persons who have been convicted of child enticement, as follows:

a. The person may be refused a driver's license by the Department of Transportation if the sentencing court specifically finds that issuance of a license to the convicted person would be inimical to the public safety and welfare [s. 343.06 (11), Stats.].

b. If the person is already licensed, the sentencing court may order the driver's license to be suspended or revoked upon the same public safety and welfare finding [s. 343.30 (2d), Stats.].

The refusal, suspension or revocation of a driver's license may be for one year from the conviction for the crime or until the person is released from prison, jail, probation or parole, whichever is later [ss. 343.06 (11) and 343.30 (2d), Stats.]

2. Discussion of Relevant Court Decisions and Other Interpretations of the Child Enticement Law

As indicated above, there are two elements of the crime of child enticement: (a) the enticement of a minor under age 18 into a vehicle, room or secluded place; and (b) the intent to commit a crime against sexual morality. The terms "enticement" and "crimes against sexual

morality" are not defined in the statutes. However, both elements have been construed by Wisconsin appellate courts.

The enticement element was clarified in State v. Huebner, 33 Wis. 2d 505 (1967), in which the Wisconsin Supreme Court distinguished between the completed crime of child enticement and the attempted crime of child enticement. The Court stated:

> The crime of enticement of a child for immoral purposes is a completed crime by its very definition and not an attempt to commit a crime against sexual morality.... The gravamen of the crime is not the commission of an act against sexual morality, but in succeeding in getting a child under eighteen years of age to enter a vehicle, building, room, or secluded place by enticement or persuasion with intent to commit such a crime. The attempt of this crime is completed when the defendant with the necessary intent tries to persuade or entice the child to get into the vehicle or secluded place. [Emphasis added; Huebner, supra, 33 Wis. 2d, at 513-514].

Thus, according to the Court in Huebner, the crime of child enticement is the completed act of succeeding in getting a minor into a secluded place, with the requisite intent, whereas attempted child enticement is where the defendant tries unsuccessfully to persuade or entice a minor. An attempted enticement would have been the completed act of enticement but for an intervening act, such as resistance by the victim [see s. 939.32, Stats., Attempt].

The second element of the crime of child enticement, which is having the intent to commit a crime against sexual morality, was clarified in State v. Morrow, 95 Wis. 2d 595 (Ct. App. 1980). In that case, the Court of Appeals for the Third Appellate District was faced with the issue of whether first degree sexual assault is a crime against sexual morality within the meaning of the child enticement statute. The Court held that a "crime against sexual morality" under the enticement statute is not limited to one of the crimes included in ch. 944, Stats., relating to crimes against sexual morality. The Court stated that other crimes which constitute immoral acts (i.e., acts against the customs or accepted standards of the people of Wisconsin, which are also sexual acts), including sexual assault, may constitute crimes against sexual morality within the meaning of the criminal child enticement statute.

B. SUGGESTIONS FOR STATUTORY REVISIONS

1. Persons Covered

a. Background

Under the current child enticement statute, only persons 18 years of age or older may be charged with and convicted of enticing a minor. This age distinction is not consistent with other Criminal Code provisions. The Criminal Code generally does not make a distinction between adults and minors as perpetrators, because perpetrators under the age of 18 are not subject to the Criminal Code. These minors are subject to a finding of delinquency in juvenile court proceedings under ch. 48, Stats., and, if age 16 or 17, possible waiver into the adult criminal courts.

The Law School Proposal suggests removing the under 18 age limitation on perpetrators from the criminal child enticement statute, as a means of granting prosecutors more discretion in determining how to proceed with juveniles; that is, juveniles (persons under age 18) may either be found delinquent by the courts under ch. 48, Stats., or waived into the criminal courts and prosecuted as adults for the commission of the crime of child enticement.

b. Suggestion

The Special Committee could consider removing the age limitation on perpetrators from the child enticement statute. This action would make the statute consistent with similar crimes and would allow courts to proceed under the ch. 48 delinquency provisions or, if juvenile court jurisdiction is waived, under adult criminal prosecution provisions.

[For the specific language suggested in the Law School Proposal, see the following provision of the Proposal: s. 960.20 (1), Enticing a Child.]

2. Attempted Enticement

a. Background

Under a general Criminal Code provision, s. 939.32 (1), Stats., the attempted commission of any felony is punishable by a fine or imprisonment of up to 1/2 the maximum penalty for the completed crime. Accordingly, attempted child enticement is punishable by 1/2 the penalty for the completed act of child enticement. Thus, the penalty for attempted child enticement is a fine of up to $5,000, imprisonment up to five years, or both.

"Attempted" child enticement has been determined by the Wisconsin Supreme Court to be the act of trying unsuccessfully to persuade or entice a minor into a vehicle or secluded place with the intent to commit an act against sexual morality. "Completed" child enticement is the act of successfully persuading a minor into a vehicle or secluded place with the intent to commit an act against sexual morality regardless of whether the act against sexual morality is actually completed [Huebner, supra; ss. 939.32 (1) and 944.12, Stats.].

The Law School Proposal suggests making attempted enticement the equivalent of the completed crime of child enticement, thereby making the penalty identical for both. The rationale in the Proposal for this suggestion is that:

> An actor who tries to cause a child to accompany him (i.e., an actor who is unsuccessful in his attempt to cause a child to accompany him) is as culpable as one who succeeds in getting a child into a car or secluded place but fails to accomplish his ultimate purpose.

b. Suggestions

The Special Committee could consider the following options relating to changes in the child enticement statute:

(i) Including the words "entices or attempts to entice" within the text of s. 944.12, Stats.;

(ii) Specifying in s. 939.32, Stats., that attempts under s. 944.12, Stats., are subject to the penalties for the completed act [this is done with attempts to intimidate witnesses under s. 940.46, Stats.];

(iii) Specifying, in either ss. 939.32 or 944.12, Stats., that the first violation of the prohibition against an attempt to commit criminal child enticement would be subject to 1/2 the penalty of the completed act and that subsequent violations would be subject to increasingly greater penalties, such as 3/4ths of the penalty of the completed act, up to the full penalty for the completed act.

[For the specific language in the Law School Proposal, see the following provision of the Proposal: s. 960.20 (1), Enticing a Child.]

3. Acts Constituting Enticement

a. Background

Current law prohibits persuading or enticing a minor into certain places for the purpose of committing a crime against sexual morality. In a letter to Representative Louise M. Tesmer, Chairperson of the Assembly Committee on Criminal Justice, dated March 21, 1985, Attorney General Bronson C. LaFollette commented on 1985 Assembly Bill 37, relating to child enticement, as follows:

> ...using the verbs "persuades" and "entices" in the statute limits, as a practical matter, application of the statute to those children who are old enough and mature enough to be subject to persuasion or coaxing. Thus, the legislation [1985 A.B. 37] would not apply to children who, by virtue of their tender years or limited mental ability, could not be persuaded or enticed. Use of a less restrictive verb such as "causes" would eliminate this flaw in the statute.

Assembly Substitute Amendment 1 to 1985 Assembly Bill 37, which was recommended for passage by the Assembly Committee on Criminal Justice, included the following provision:

> 940.205 (2) Whoever causes or tries to cause a child who has not attained the age of 16 years to accompany him or her in or to any vehicle or in or to any building, room or secluded place, for the purpose of doing any of the following, is guilty of a Class C felony.... [Emphasis added.]

1985 Assembly Bill 37 was recommended for passage, as amended, by the Assembly Committee on Criminal Justice, but the Bill received no further action and failed to pass.

The Law School Proposal suggests substituting the word "causes" for the words "persuades or entices." Because "entices," interpreted literally, describes a manner of speaking rather than an act or the consequence of the act, the Proposal recommends the use of the word "causes" as a way to focus on the criminal act involved in child enticement.

b. Suggestion

The Special Committee could consider substituting, for the term "persuades or entices," the term "causes," or some other word, to describe the prohibited activity of child enticement.

[For the specific language in the Law School Proposal, see the following provision of the Proposal: s. 960.20 (1) (intro.), Enticing a Child.]

4. Prohibited Intended Acts

a. Background

Current law, as construed in Huebner, supra, prohibits child enticement with an accompanying intent to commit a crime against sexual morality. However, this intended crime against sexual morality is not limited to one of the crimes found in ch. 944, Stats. Under the Court's decision, a crime against sexual morality, within the meaning of the child enticement statute, is any crime which constitutes an act contrary to the customs or accepted standards of the people of Wisconsin which is also a sexual act. The Court did not provide a list of acts which constitute crimes against sexual morality in this generic sense.

The Law School Proposal suggests removing the reference to "crimes against sexual morality" from the enticement statute and replacing it with an enumeration of the following prohibited "intended purposes":

(i) Having sexual contact, including sexual intercourse, with the child;

(ii) Causing the child to engage in prostitution;

(iii) Exposing a sex organ to the child or causing the child to expose a sex organ;

(iv) Taking lewd, obscene or indecent pictures of the child;

(v) Causing bodily harm to the child*; or

---

* Bodily harm would encompass the Law School Proposal's definition, which is "physical pain or injury or any impairment of physical condition, including severe bruising, lacerations, burns, the infliction of unnecessary pain and the temporary impairment of physical condition caused by the administration of excessive doses of drugs or other potentially harmful substances, and the debilitation caused by extreme neglect."

(vi) Giving or selling to the child a controlled substance.

The first three prohibited intended purposes are expressly covered under the current child enticement statute because they are also included in ch. 944, Stats., crimes against sexual morality; the last three are not. However, while item (iv), relating to taking obscene pictures of a child, is not expressly prohibited under the child enticement statute, it probably would be considered as such under the Court of Appeals' ruling in Morrow, supra.

1985 Assembly Bill 37, as recommended for passage by the Assembly Committee on Criminal Justice, dealt with the prohibited acts issue by adding the following illegal purposes in the child enticement statute:

(i) Engaging in the sexual exploitation of a child, defined in s. 940.203, Stats., to prohibit coercing or permitting a child to engage in sexually explicit conduct, recording such conduct and to prohibit the production, promotion or distribution of a recording of a child engaged in such conduct.

(ii) Engaging in lewd and lascivious behavior, as defined in s. 944.20, Stats., in the presence of a child.

(iii) Exposing a child to harmful materials, within the meaning of s. 944.25, Stats.

(iv) Contributing to the delinquency or neglect of a child, within the meaning of s. 947:15, Stats.

b. Suggestions

The Special Committee could consider removing the reference to "a crime against sexual morality" in the current child enticement statute and replacing it with a prohibition against specified intended purposes. The Committee could use those purposes enumerated in the Law School Proposal or those set forth in 1985 Assembly Bill 37.

[For the specific language of the Law School Proposal, see the following provisions of the Proposal: ss. 960.02 (2), Definitions, and 960.20 (1) (a) to (f), Enticing a Child.]

5. Other Intended Criminal Acts

a. Background

Under current law, enticement of a minor with the intent to commit a criminal act, other than an act against sexual morality, is not a crime itself, even where the subsequent commission of the intended act is a crime.

The Law School Proposal suggests that enticing a minor with intent to perform other criminal acts is also harmful to the minor. Therefore, the Proposal suggests the creation of a new statute establishing the crime of "harassing a child." This statute would be in addition to the child enticement statute. The child harassment statute would prohibit the enticement or attempted enticement of a minor for any unlawful purpose. "Unlawful purpose" would be defined broadly in the statute as any purpose which, if accomplished, would be a crime under Wisconsin law. Under the Law School Proposal, the statute would provide that lack of proof of a prior relationship with the minor would be prima facie evidence that the person had an unlawful purpose. "Prior relationship" is not defined in the Law School Proposal.

Assembly Substitute Amendment 1 to 1985 Assembly Bill 37 included a similar provision to the Law School Proposal, except that it also defined "prior relationship" to include, without limitation:

> The relationship...[between the child and a] parent, other relative, guardian, foster parent, person permanently or temporarily responsible for the child's welfare, teacher or other school employe, physician or other health care professional, counselor, social worker, peace officer, employer, customer, host, minister or other religious adviser, supervisor or other employe of any voluntary organization of which the child is a member, friend or neighbor.

Another aspect of both the Law School Proposal and 1985 Assembly Bill 37 is the treatment of the crime of child harassment as a "lesser included offense" of child enticement. The significance of this treatment is that, where a crime has a corresponding "lesser included offense," a suspect may be charged and convicted of one crime or the other, but not both crimes. Under both the Proposal and the Bill, the penalty for child harassment would be a Class A misdemeanor (punishable by a fine of not more than $10,000, imprisonment up to nine months, or both). [The current penalty for child enticement is a Class C felony, punishable by a fine of not more than $10,000, imprisonment not longer than 10 years, or both.]

b. Suggestions

The Special Committee could consider creating a separate child harassment statute making it a crime to entice a minor for any unlawful purpose. If a separate statute is recommended, the Special Committee could consider:

(i) Whether the penalty for such an offense should be less than the current penalty for child enticement;

(ii) Whether an attempt to commit such an offense should carry the same or a lower penalty; and

(iii) Whether any presumptions should be made regarding intent based upon lack of prior relationship with a minor.

[For the specific language in the Law School Proposal, see the following provision of the Proposal: s. 960.205, Harassing a Child.]

PART III

FORNICATION, SEXUAL GRATIFICATION AND LEWD AND LASCIVIOUS BEHAVIOR

A. EXPLANATION OF CURRENT LAW

1. Fornication

a. Description of Fornication Statute

The current fornication statute covers two different types of criminal behavior: (i) having sexual intercourse in public; and (ii) having sexual intercourse with a minor age 16 or older but under age 18, when that minor is not the person's spouse. Fornication of either type is a Class A misdemeanor (punishable by a fine not to exceed $10,000, imprisonment not to exceed nine months, or both) [s. 944.15, Stats.]. The prohibition against public sexual intercourse is irrelevant for the purposes of this discussion and will not be covered here.

As with the crime of incest, described in Part I of this Discussion Paper, no separate definition of sexual intercourse is provided in the fornication statute. Therefore, the general definition of sexual intercourse, limited to vulvar penetration, applies to the fornication statute [s. 939.22 (36), Stats.].

As with the portions of the sexual assault statute involving minors, the age of the minor and the act of sexual intercourse are the only elements of the crime of fornication; consent of the minor is not a defense. The age of the perpetrator is also irrelevant. Therefore, consensual sexual intercourse between two minors 16 years of age or older and under age 18 would constitute a violation of the fornication statute.

b. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no relevant court decisions or other interpretations of s. 944.15, Stats.

2. Sexual Gratification

a. Description of Sexual Gratification Statute

The current sexual gratification statute prohibits, in pertinent part, the commission of an act of sexual gratification with a minor who is

16 years of age or older but under age 18 and who is not the perpetrator's spouse. "Act of sexual gratification" is not specifically defined for purposes of this statute, but such an act is prohibited if it involves the sex organ of one person and the mouth or anus of another. Violation of the sexual gratification statute is a Class A misdemeanor (punishable by a fine not to exceed $10,000, imprisonment not to exceed nine months, or both) [s. 944.17, Stats.]. Other acts of sexual gratification prohibited under this statute are irrelevant for purposes of this discussion and will not be covered here.

Similar types of sexual contact, including sexual intercourse, involving minors under the age of 16 are prohibited by s. 940.225 (1) (d) and (2) (e), Stats., relating to first and second degree sexual assault. These provisions are described in Part III of Discussion Paper 86-1A.

b. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no relevant court decisions or other interpretations of s. 944.17, Stats.

3. Lewd and Lascivious Behavior

a. Description of Lewd and Lascivious Behavior Statute

The current lewd and lascivious behavior statute prohibits: (i) committing an indecent act of sexual gratification with another person with the knowledge that others are present; and (ii) publicly and indecently exposing a sex organ [s. 944.20, Stats.]. As in s. 944.17, the term "sexual gratification" is not defined in s. 944.20. Unlike s. 944.17, the type of sexual gratification constituting a crime under the lewd and lascivious behavior statute is not limited to acts involving the sex organ of one person and the mouth or anus of another. Violation of either provision in the lewd and lascivious behavior statute is a Class A misdemeanor (punishable by a fine not to exceed $10,000, imprisonment not to exceed nine months, or both).

Exposure of a sex organ, without any actual contact, is not prohibited in the Criminal Code, other than under the lewd and lascivious behavior statute. However, exposing a minor to a visual reproduction depicting nudity or lewd exhibition of the genitals is prohibited under s. 944.25 (10), Stats., relating to exposing minors to harmful materials, discussed in Part IV of this Discussion Paper.

b. Discussion of Relevant Court Decisions and Other Interpretations of the Law

Unlike the fornication and sexual gratification statutes, the lewd and lascivious behavior statute does not separately prohibit conduct involving minors or occurring in the presence of minors; the statute's general language clearly covers minors. Under s. 944.20 (1), the term "in the presence of others" requires only that a person other than the participants be present to observe the lewd behavior. However, it is unclear whether, under the provisions of s. 944.20 (2), indecent exposure of a sex organ to a minor, outside of the presence of others, constitutes "public exposure" within the meaning of the statute.

The U.S. District Court for the Western District of Wisconsin, in construing the word "publicly" in s. 944.20 (2), noted that the lewd and lascivious statute has a two-fold purpose to prevent situations in which: (i) the conduct assaults the sensibilities of unwilling adults; and (ii) the conduct exposes minors to obscenity. The Court stated that the scope of the statute extends only as far as is necessary to fulfill these constitutionally permissible purposes. Thus, under this interpretation of the statute, exposing minors to conduct prohibited under the statute may be construed as "public" even if the minor is the only person observing the conduct [Reichenberger v. Warren, 319 F. Supp. 1237, at 1239 (1970)].

In a 1983 case, where the defendant enticed a child into a closed basement workroom and exposed his genitals to her, a Wisconsin circuit court found that the exposure constituted "publicly and indecently exposing a sex organ" within the meaning of the lewd and lascivious behavior statute. The defendant had argued that the act was not committed "publicly" within the meaning of the the statute, because only the defendant and the victim were present. The circuit court's decision was appealed, but the Wisconsin Supreme Court, while upholding the conviction, did not rule on this issue [State v. Cuyler, 110 Wis. 2d 133 (1983)].

B. SUGGESTIONS FOR STATUTORY REVISIONS

1. Age of Victim and Perpetrator

a. Background

The fornication and sexual gratification statutes prohibit conduct, involving minors over the age of 16 but under 18, that is similar to conduct involving younger minors which is prohibited under the sexual assault law, s. 940.225, Stats. The lewd and lascivious behavior provision relating to exposing a sex organ prohibits conduct not prohibited elsewhere, but the age of the victim is irrelevant to the

crime. All these statutes relate to a wide range of criminal sexual conduct, some involving victims of different ages.

The Law School Proposal suggests that, where 13- to 17-year old minors are concerned, distinguishing these crimes solely on the basis of the age of the minor victim results in inconsistencies in the penalties imposed for these crimes. This is because the current statutes, taken together, make too great a distinction in penalties between crimes involving victims under age 16 and crimes involving victims age 16 or older, but under age 18. The Law School Proposal recommends that factors other than age, such as maturity, consent and the type of conduct involved, become more relevant with 13- to 17-year old minors.

To assist in a review of this issue, the table below compares the current sexual assault, fornication, sexual gratification and lewd and lascivious behavior statutes, based on the prohibited conduct, age of victim and penalty classifications.

COMPARISON OF CRIMES
INVOLVING SEXUAL CONDUCT

TYPE OF CRIME	STATUTORY REFERENCE	PROHIBITED CONDUCT	AGE OF VICTIM	CLASS OF PENALTY	PENALTY
First Degree Sexual Assault	940.225 (1) (d)	Sexual intercourse (all types) or contact	Minors 12 years or younger	Class B felony	20 years imprisonment
Second Degree Sexual Assault	940.225 (2) (e)	Sexual intercourse (all types) or contact	Minors over 12 and under 16 years	Class C felony	$10,000 fine or 10 years imprisonment, or both
Fornication	944.15 (2)	Vulvar penetration	Minors 16 years or older	Class A misdemeanor	$10,000 fine or 9 months imprisonment, or both
Sexual Gratification	944.17 (2) (b)	Genital-mouth or anal intercourse	Minors 16 years or older	Class A misdemeanor	$10,000 fine or 9 months imprisonment, or both
Lewd and Lascivious Behavior	944.20 (2)	Indecent exposure of a sex organ	No age limit specified	Class A misdemeanor	$10,000 fine or 9 months imprisonment, or both

SOURCE: Prepared by Legislative Council Staff from current statutes.

The Law School Proposal suggests that the difference in penalties among the crimes shown in the table fails to take into account the relative maturity and consent involved with two 14- or 15-year old minors. The Law School Proposal suggests reducing this disparity by making second degree sexual assault, fornication and sexual gratification apply to all minors over the age of 12 and under the age of 18. The purpose of expanding the age ranges for these crimes, according to the Law School Proposal, would be to afford greater discretion to the prosecuting authorities to make the appropriate charge based on issues such as consent and maturity of older minors rather than having to apply a statutory age factor.

The Law School Proposal suggests that the statutes should more accurately reflect situations where coercion or lack of consent is likely to be involved in these crimes. The Proposal would accomplish this goal by making sexual intercourse a crime when the perpetrator is two or more years older than the minor victim. The Law School Proposal notes that this suggestion is consistent with the American Law Institute's Model Penal Code, which punishes sexual contact with a minor over the age of 16 only when the male is four or more years older than the minor female. The commentary accompanying the Model Penal Code states that this language gives effect to the rationale behind statutory rape, i.e., the "victimization of immaturity," without punishing consensual sexual activities between minors 16 years of age or older.

Both the Law School Proposal and the Model Penal Code assume that: (i) some minors are competent to consent to engaging in sexual conduct; and (ii) the point of capacity to consent is not necessarily a function of age. The current sexual assault, fornication and sexual gratification statutes reflect a public policy that all minors under the age of 16 are incompetent to consent to sexual conduct of any kind and that all minors 16 and over, but under 18, are incompetent to consent to sexual intercourse.

b. Suggestions

The Special Committee could consider whether the present age requirements and penalties for crimes listed in the table should be changed and whether these penalties should reflect consensual versus nonconsensual sexual conduct involving minors between the ages of 13 and 17.

If the Committee wishes to eliminate the age distinctions in the second degree sexual assault, fornication and sexual gratification statutes, it could consider expressly stating the factors to be taken into account in charging for these crimes. For example, the Committee could consider including some form of the element of consent in the statutes

listed in the table involving sexual conduct of minors 16 years of age or older. This result could be accomplished by expressly including the element of consent, as is done currently in the sexual assault statute provisions governing sexual contact other than intercourse, or by including consent as a function of an age differential, or by some other measure of consent.

[For the specific language of the Law School Proposal, see the following provision of the Proposal: s. 960.23, Having Sexual Intercourse With a Child.]

2. Activities Covered

a. Background

The Law School Proposal raises two issues relating to the types of sexual activities covered, or not covered, by the fornication, sexual gratification and lewd and lascivious behavior statutes.

First, sexual intercourse involving vulvar penetration with minors age 16 and over, under the fornication statute, is treated separately from other types of sexual intercourse with minors age 16 and over under the sexual gratification statute, although the penalties are identical. The Law School Proposal suggests consolidating these into one crime prohibiting sexual intercourse of any kind, to be consistent with the more inclusive definition of sexual intercourse found in the sexual assault statute and the Law School Proposal.

Second, the lewd and lascivious behavior statute does not provide a separate penalty for exposing a sex organ to a minor, whether the act is done publicly or privately. The Law School Proposal suggests making any exposure of a sex organ to a minor for the purpose of sexual arousal or gratification a Class A misdemeanor, and adding the crime of causing a child to expose a sex organ. The Law School Proposal reasons that both exposing a sex organ to a minor and causing a minor to expose a sex organ can be harmful to the minor, regardless of whether others are present. Under the Law School Proposal, both provisions would apply only where the perpetrator is at least two years older than the minor.

b. Suggestions

The Special Committee could consider:

(i) Creating a single statute prohibiting all types of sexual intercourse involving minors age 16 and over, rather than retaining the

separate statutes for fornication (involving vulvar penetration) and sexual gratification (involving other types of sexual intercourse);

(ii) Modifying the lewd and lascivious behavior statute to prohibit exposing a sex organ to a minor, regardless of whether any other person is present; and

(iii) Creating a statute making it a crime against sexual morality to cause a minor to expose a sex organ.

If the Special Committee decides to include other types of sexual contact in the Criminal Code provisions relating to minors age 16 and over, it could also consider whether penalties for sexual contact, other than sexual intercourse and for exposing a sex organ, should be the same as, or lower than, the penalty for sexual intercourse.

[For the specific language suggested in the Law School Proposal, see the following provisions of the Proposal: ss. 960.23, Having Sexual Intercourse With a Child; 960.25, Exposing a Sex Organ to a Child.]

PART IV

OBSCENITY AND EXPOSURE OF MINORS TO HARMFUL MATERIALS

A. EXPLANATION OF CURRENT LAW

1. Obscenity

a. Description of Obscenity Statute

Section 944.21, Stats., states that whoever does any of the following is guilty of a Class D felony (punishable by a fine not to exceed $10,000, imprisonment not to exceed five years, or both):

(i) Imports, prints, advertises, sells, has in his or her possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording or film;

(ii) Advertises, produces or performs in any lewd, obscene or indecent performance;

(iii) Has in his or her possession, with intent to transfer or exhibit to a minor under the age of 18 years, any obscene matter; or

(iv) Requires, as a condition to the purchase of periodicals, that a retailer accept material known by the distributor to be lewd, obscene or indecent.

b. Discussion of Relevant Court Decisions and Other Interpretations of the Law

Wisconsin has had some form of an obscenity statute since 1849. The obscenity statute was amended to its present form in 1955 as part of the recodification of the Criminal Code [Ch. 696, Laws of 1955]. The public policy underlying crimes against sexual morality, in general, and the obscenity law, in particular, is to keep certain conduct or material from offending the sensibilities of minors and unconsenting adults.

In 1980, the Wisconsin Supreme Court struck down s. 944.21, Stats., as unconstitutional, in State v. Princess Cinema of Milwaukee, 96 Wis. 2d 646 (1980). The decision was based on an earlier U.S. Supreme Court decision in Miller v. California, 413 U.S. 15 (1973), which set forth the minimum standards for determining whether material is obscene and, therefore, unprotected as free speech under the First Amendment to the U.S. Constitution.

In the Miller case, the U.S. Supreme Court developed a three-part test to determine what constitutes obscenity. Under this test, the finder of fact (the court or jury) must determine:

(i) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(ii) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(iii) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Regarding what is meant by "sexual conduct," as used in the second component of the obscenity test, the Miller Court held that a statute must list precisely depicted acts which constitute sexual conduct to represent the kind of conduct that, if it were the theme of a work, could render it legally obscene. Although the Miller Court left to state legislatures the decision regarding the contents of the list of acts constituting sexual conduct to which the obscenity law would be applied, it suggested that appropriate examples of such sexual conduct would include:

(i) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and

(ii) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.

Since Miller, the U.S. Supreme Court has examined other state obscenity laws. The general guidelines enunciated in Miller have not been changed by the Court in subsequent opinions.

Based on the Miller test, the Wisconsin Supreme Court held in the Princess Cinema case that s. 944.21, Stats., is unconstitutionally overbroad on its face and beyond saving by judicial interpretation to bring it within constitutional limits. In arriving at this conclusion, the Court stated that its 1973 judicial interpretation of the statute was in error [State ex rel. Chobot v. Circuit Court, 61 Wis. 2d 354, 212 N.W. 2d 690 (1973)].

The Court in Princess Cinema declined to further judicially construe the Wisconsin obscenity statute to bring it into compliance with the U.S. Supreme Court's Miller test. The Court stated that issues of public policy and the regulation of criminal conduct are for the Legislature to resolve.

A number of bills have been introduced in the Legislature since the 1980 Princess Cinema decision, but none has been enacted into law. [See 1981 Assembly Bills 56 and 240 and Senate Bills 335 and 453; 1983 Senate Bills 114, 256 and 488 and Assembly Bill 17; and 1985 Senate Bill 31.] Although s. 944.21, Stats., has never been repealed by the Legislature, its unconstitutionality makes it unenforceable.

2. Exposure of Minors to Harmful Materials

a. Description of Exposure of Minors to Harmful Materials Statute

Under s. 944.25, Stats., whenever the Attorney General or a district attorney has reasonable cause to believe that any person is engaged in selling or exhibiting harmful material to minors, the Attorney General or district attorney must bring a civil declaratory judgment action for adjudication of the question of whether the material is harmful to minors. Under this statute, the term "harmful to minors" is defined as:

> ...[t]hat quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
>
> 1. Predominantly appeals to the prurient, shameful or morbid interest of minors;
>
> 2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> 3. Is utterly without redeeming social importance for minors.

If the material is found to be harmful to minors as a result of this civil proceeding, the court must issue a declaratory judgment to this effect. The court may also enjoin any person who has been exposing minors to this material for commercial purposes from doing so in the future. The court must notify any person who may be affected by the decision of the adjudication that the material is harmful to minors.

If any person who has been so enjoined or notified knowingly sells, exhibits or loans for monetary consideration to a minor any material adjudged harmful to minors, that person is guilty of a Class A misdemeanor (punishable by a fine not to exceed $10,000, imprisonment not to exceed nine months, or both). No criminal proceeding may be brought under this provision without a prior adjudication on the issue of whether the

material is harmful to minors and actual notice to the defendant of the adjudication.

The statute provides a defense to the crime where the defendant had reasonable cause to believe that the minor involved was 18 years or older, based on "official" or "apparently official" identification offered by the minor. The statute also provides two exceptions to criminal liability. Under the first exception, no person may be convicted where the minor is accompanied by a parent or guardian or by an adult who appears to be the minor's parent or guardian. Under the second exception, no person may be convicted if he or she is acting in the capacity of an employe of a bona fide school, museum or public library or an organization affiliated with and serving the educational purposes of a school, museum or public library (known as the "library materials" exception).

b. Discussion of Relevant Court Decisions and Other Interpretations of the Law

Three court decisions are applicable to the civil declaratory judgment action and the criminal proceeding under s. 944.25, Stats. Under the Miller decision, described above, a state may not regulate speech or expression as obscene material, unless the material meets the three-part obscenity test. The three-part test set forth in the Miller decision appears in s. 944.25 (1) (b), Stats., but is modified by using minors instead of adults in the standards by which the material is measured. This type of modification of the Miller obscenity test was found constitutional by the U.S. Supreme Court in Ginsberg v. New York, 390 U.S. 629 (1968).

The civil declaratory judgment provisions of s. 944.25, Stats., are substantially the same as the declaratory judgment of obscene materials procedure under s. 806.05, Stats. This latter statute was declared unconstitutional, in part, by the Wisconsin Supreme Court in State v. I, A Woman-Part II, 53 Wis. 2d 102 (1971). In that decision, the Court found that the statutory procedures for obtaining a declaratory judgment that certain material is obscene are unconstitutional because:

(i) The procedures have the effect of imposing restraints on speech prior to an opportunity for an adversary hearing on the issue of obscenity; and

(ii) The procedures permit a finding of obscenity without requiring the person attempting to censor the material to prove that the material meets the Miller standards when no person appears in court to defend the material.

Because the procedural provisions in s. 806.05 were found unconstitutional, the same provisions in s. 944.25, relating to the exposure of minors to harmful materials, are probably unconstitutional as well. However, no court has specifically ruled on the constitutionality of the procedural provisions of s. 944.25, Stats.

A recent informal opinion of the Wisconsin Attorney General raises the issue of the constitutionality of the exception for library materials in the harmful materials statute, s. 944.25 (11) (c), Stats. In a December 27, 1985 letter to Senator Donald K. Stitt, Attorney General Bronson C. LaFollette expressed his opinion on the constitutionality of 1985 Senate Bill 31, relating to obscenity. He stated that the library exception in Senate Bill 31, which was similar to the exception in s. 944.25 (11) (c), "probably could not withstand a constitutional challenge." The Attorney General reasoned that this exception changed the nature of the Bill from one which would prohibit the dissemination of obscenity to one which merely regulates the places obscenity may be obtained, without expressing any compelling governmental interest the state could have in allowing libraries, but not bookstores, to disseminate obscenity. These same concerns may be applicable to the library exception in the statute relating to exposure of minors to harmful materials, although this specific issue has not addressed by the Attorney General or by the courts.

B. SUGGESTIONS FOR STATUTORY REVISIONS

1. Possession and Noncommercial Transfer of Harmful Materials

a. Background

The harmful materials statute carries criminal penalties only for commercial transactions involving monetary consideration. The obscenity statute, in addition to prohibiting commercial transactions, contains a provision prohibiting the possession of obscene material with the intent to transfer or exhibit that material to a minor. This latter provision, along with the rest of the obscenity statute, is unenforceable under the decision in Princess Cinema, described in Part IV, A, above.

The Law School Proposal suggests that, because it is more difficult to prosecute crimes based on commercial transfers than crimes based on possession, the obscenity provision relating to possession with the intent to transfer or exhibit to minors should be incorporated into the harmful materials statute. The new provision would apply the "harmful to minors" standard to possession with intent to exhibit to minors and to noncommercial transfers of harmful material to minors. Because possession of the materials is considered less harmful than their transfer to a

minor, the Proposal recommends two penalty levels, as follows: (i) transfer or exhibition of the material to a minor, whether commercially or noncommercially, would be a Class A misdemeanor (punishable by a fine not to exceed $10,000 and imprisonment up to nine months, or both); and (ii) private possession with intent to transfer or exhibit to a minor would be a Class B misdemeanor (punishable by a fine not to exceed $1,000, imprisonment not to exceed 90 days, or both).

Prohibiting the private possession of material harmful to minors, as suggested in the Law School Proposal, raises constitutional issues that have not been fully resolved by the courts. Generally, private possession of written or pictorial materials, including obscene materials, is considered a free speech right protected by the First Amendment. The U.S. Supreme Court, in Stanley v. Georgia, 394 U.S. 557 (1969), declared a Georgia law prohibiting private possession of obscene material unconstitutional, because it violated both privacy and First Amendment rights. The Court expressly rejected the argument that private possession of obscene material may be prohibited entirely as a means of preventing the material from falling into the hands of minors.

Although the "harmful to minors" test in s. 944.25 is patterned after the Miller obscenity test, a finding that the material is harmful to minors is not a finding that the material is legally obscene. Presumably, material which is not legally obscene, including material which meets the "harmful to minors test," receives the same First Amendment protection afforded material which is legally obscene. However, the courts have not yet addressed the issue of private possession of material harmful to minors where there is an alleged accompanying intent to transfer or exhibit the material to minors.

b. Suggestions

The Special Committee could consider amending s. 944.25, Stats., to prohibit the noncommercial transfer or exhibition of harmful material or the private possession of harmful material with the intent to transfer or exhibit it to minors, or both. The Special Committee could consider making noncommercial transfer or exhibition of harmful materials to minors either a crime per se or an aggravating element to the crimes of, for example, child sexual assault, child enticement and solicitation of minors for prostitution.

[For the specific language in the Law School Proposal, see the following provision of the Proposal: s. 960.24 (1) and (2), Exposing a Child to Harmful Materials.]

2. Knowledge of Age of Child

a. Background

Under s. 944.25 (1) (c) and (10), Stats., knowledge that the minor is under the age of 18 is an element of the crime of exposing minors to harmful materials. The prosecution must prove this knowledge, beyond a reasonable doubt, by: (i) evidence of knowledge or information on the part of the defendant that the person is a minor; or (ii) evidence that the defendant had reason to know, a belief or a ground for belief which warranted further inspection or inquiry of the age of the minor.

The Law School Proposal suggests: (i) deleting the present provision making knowledge of the minor's age an element of the crime; and (ii) transferring the burden of proof to the defendant, by making the defendant's "reasonable cause to believe" the minor was 18 years old or more an affirmative defense to the crime. This change is consistent with other crimes against children, which generally do not require proof of knowledge of the victim's age. The change would remove from the prosecution the burdensome task of proving the defendant's state of mind at the time the crime was committed.

b. Suggestion

The Special Committee could consider removing from the law the requirement that the prosecution prove knowledge of the minor's age. [The present provision would be retained which makes "reason to believe the minor was over age 18" a defense to the crime of exposing minors to harmful materials.]

[For the specific language of the Law School Proposal, see the following provision of the Proposal: s. 960.24 (1), (2) and (4), Exposing a Child to Harmful Materials.]

3. Definitions

a. Background

The U.S. Supreme Court, in its decision in Miller, held that any obscenity law: (i) must define, as precisely as possible, the test to be used to determine whether material is obscene; and (ii) must describe the types of sexual conduct that must be portrayed in the material in order to be able to apply the obscenity test.

The current harmful materials statute appears to comport with the Miller decision's minimum constitutional requirements for specificity.

However, two of the definitions describing prohibited material ("harmful to minors" and "sadomasochistic abuse") may be too narrow to apply in many cases of allegedly obscene material and may provide more protection against suppression of free speech than is necessary under minimum constitutional requirements.

The present statutory definition of "harmful to minors" follows, for the most part, the three-part Miller obscenity test described in Part IV, A, of this Discussion Paper. The Miller decision required that one component of the three-part obscenity test is that the materials, when taken as a whole, "lack serious literary, artistic, political or scientific social importance." Other states' obscenity statutes and harmful materials statutes also incorporate "educational" value in addition to the other measures of value of the material to minors. The corresponding "value" component in Wisconsin's present "harmful to minors" statute requires a finding that the material is "utterly without redeeming social importance" for minors. This "utterly without social importance" standard had been articulated in several pre-Miller Supreme Court decisions; but it was finally rejected in Miller because it was nearly impossible to prove a total lack of value in allegedly obscene material. Because of the Supreme Court ruling on what is constitutionally required in a "value" test, the present "harmful to minors" statute may be easier to apply if it incorporates the Miller "value" test and adds "educational value" as a measure of the value of the material.

The following definition of "sadomasochistic abuse" in s. 944.25 (1) (h), Stats., is considered archaic for purposes of determining whether material depicting such sexual conduct is harmful.

> "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

This definition of sadomasochistic abuse, which includes a requirement that the participants be clothed a certain way, probably would not describe what most people consider to be sadomasochistic abuse. A more contemporary definition is contained in s. 450.155 (1) (i), Stats., created by 1985 Wisconsin Act 146, which defines "sadomasochistic abuse" as "the infliction of force, pain or violence upon a person for the purpose of sexual arousal or gratification." This Act 146 definition relates to certain prohibitions regarding the exhibition, display or advertisement of vending machines which dispense contraceptives.

b. Suggestion

The Special Committee could consider modernizing the definitions of "harmful to minors" and "sadomosochistic abuse" in the statute relating to exposure of minors to harmful materials.

4. Civil Declaratory Judgment Procedure

a. Background

As indicated above, certain elements of the declaratory judgment procedure for determining whether material is harmful to minors may be constitutionally infirm. The Court's decision in State v. I, A Woman-Part II, 53 Wis. 2d 102 (1971), declaring portions of a nearly identical declaratory judgment procedure unconstitutional, provides guidance for assessing the procedure in the harmful materials statute. Specifically, the preliminary injunction and default judgment provisions are probably unconstitutional under the reasoning of the Court in I, A Woman-Part II, because:

(i) The preliminary injunction provision permits the prior restraint of constitutionally-protected materials without an adversary hearing on whether the injunction is necessary or appropriate; and

(ii) The default judgment provision permits a final order suppressing constitutionally-protected material without any adversary hearing on whether the material is harmful to minors.

The Court was also critical of the possibility that the declaratory judgment order finding material obscene could be applied in a criminal prosecution at a future time. The Court indicated that this result might be inconsistent with the Miller test requirement that material be judged on "contemporary" community standards, not community standards of five or 10 years ago. However, the Court did not specifically rule on this issue.

b. Suggestions

The Special Committee could consider the following changes in the civil declaratory judgment procedure in the harmful materials statute:

(i) Delete the civil declaratory judgment procedure. Although the purpose of the civil procedure is to avoid prior restraint of materials that may be protected under the First Amendment, the procedure prescribed in the statutes is flawed and the procedure is probably not required under the Constitution;

(ii) Delete the preliminary injunction provision or amend the provision to prohibit a court from issuing a preliminary injunction without a probable cause determination based on an adversary hearing on the issue of whether the material is harmful to minors; or

(iii) Delete the default judgment provision, which would allow a court to enter an order finding the material harmful to minors without a hearing on the issue when no person comes forward to defend the material.

The Special Committee may also wish to consider adding a requirement that any criminal conviction, based on a declaratory judgment that certain material is harmful to minors, must be reasonably proximate in time to the declaratory judgment order. This change may better ensure that any criminal conviction based on the "community standards" test is based on current community standards.

5. Library Exception

a. Background

The statute relating to exposure of minors to harmful materials provides an exemption from criminal prosecution to "a bona fide school, museum or public library" or to a person acting in the capacity of an employe thereof. This statutory exception has never been challenged in court. However, a recent informal Attorney General opinion indicated that a similar exception, which was included in a proposed bill relating to obscenity, probably would not withstand a constitutional challenge in court, because it permits persons to obtain obscene materials from libraries while prohibiting persons from obtaining obscene materials from all other places without providing a rational basis for this unequal treatment. The Law School Proposal suggests retaining this library exception.

b. Suggestions

The Special Committee could consider:

(i) Retaining the exception from the harmful materials statute for schools, museums and public libraries, pending a ruling by a court on whether this type of classification is constitutional;

(ii) Deleting the exception; or

(iii) Amending the statute to clarify the state's interest in retaining the exception, as a means of giving guidance to any court which may rule on the statute's constitutionality.

[For the specific language in the Law School Proposal, see the following provision of the Proposal: s. 960.24 (4) (c), Exposing a Child to Harmful Materials.]

PART V

SOLICITING PROSTITUTES

A. EXPLANATION OF CURRENT LAW

1. Description of Soliciting Prostitutes Statute

Under the soliciting prostitutes statute, it is a crime to intentionally solicit or cause any person to practice prostitution or to establish any person in a place of prostitution [s. 944.32, Stats.]. "Place of prostitution" is defined generally in s. 939.22 (24), Stats., as:

> Any place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact for anything of value.

Violation of the solicitation statute is a Class D felony (punishable by a fine not to exceed $10,000, imprisonment not to exceed five years, or both), unless the person solicited to practice prostitution is under the age of 18, in which case violation is a Class C felony (punishable by a fine not to exceed $10,000, imprisonment not to exceed 10 years, or both).

Prostitution is prohibited separately under s. 944.30, Stats. The prohibited activities include having, offering or requesting an act of sexual contact, including nonmarital sexual intercourse, sexual gratification and masturbation, in exchange for anything of value or being an inmate of a place of prostitution. Violation of the prostitution statute is a Class A misdemeanor (punishable by a fine not to exceed $10,000, imprisonment not to exceed nine months, or both).

2. Discussion of Related Court Decisions and Other Interpretations of the Law

There has been one court decision on the constitutionality of s. 944.32, Stats. The Wisconsin Court of Appeals for the Second Appellate District, in the case State v. Johnson, 108 Wis. 2d 703 (Ct. App. 1982), held that:

(i) The solicitation for prostitution statute does not, on its face, prohibit constitutionally protected speech. The court stated that the

crime of solicitation is "directed at speakers who intentionally propose an illegal commercial transaction" and, as such, "does not, in general, implicate speech protected by the first amendment"; and

(ii) The higher penalty for solicitation for prostitution, compared with the much lower penalty for the crime of prostitution itself, is constitutionally valid. The court noted that the crime of prostitution carries a nine-month maximum sentence, as opposed to a five-year maximum sentence for solicitation for prostitution. The court found there was a reasonable basis for the disparity in the penalties, because the crime of solicitation to "practice prostitution" implies solicitation of repeated, ongoing criminal conduct, whereas the crime of prostitution implies a single act. Thus, repeated acts of prostitution may be charged as separate violations of the prostitution statute, resulting in the potential for several consecutive nine-month sentences.

B. SUGGESTIONS FOR STATUTORY REVISIONS

1. Background

The Law School Proposal suggests retaining, largely intact, the crime of solicitation of a minor for prostitution.

The Proposal discusses the relationship between solicitation for prostitution and sexual exploitation of children and their respective penalties. The Proposal concludes that the existing penalty for solicitation of minors for prostitution should be retained, because of the longer history of the solicitation statute and the legislative determination that solicitation is a crime against sexual morality rather than a crime against bodily security.

The Law School Proposal also suggests retaining both soliciting for prostitution and causing a person to engage in prostitution, at the same penalty level, within the single crime of soliciting for prostitution. The Law School Proposal cites the reasoning in the American Law Institute's Model Penal Code that:

> When an actor's failure to commit the substantive offense is due to a fortuity, as...when the expected response to solicitation is withheld, his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice.

2. Suggestions

The Special Committee could consider whether the penalty (Class C felony) for the crime of solicitation of a minor for prostitution should be retained or lowered to conform with the penalty for the crime of prostitution (Class A misdemeanor). The Special Committee could consider whether both successful and unsuccessful acts of solicitation of a minor for prostitution should be penalized at the same level.

[For the specific language of the Law School Proposal, see the following provision of the Proposal: s. 960.21, Soliciting a Child for Purposes of Prostitution.]

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APPENDIX

STATUTES DISCUSSED IN DISCUSSION PAPER 86-1B
(LISTED IN NUMERICAL ORDER)

STATUTES DISCUSSED IN DISCUSSION PAPER 86-1B
(LISTED IN NUMERICAL ORDER)

343.06 PERSONS NOT TO BE LICENSED. (11) To any person who has been convicted of any offense specified under ss. 940.225 and 944.12 or adjudged delinquent under ch. 48 for a like or similar offense, when the sentencing court makes a finding that issuance of a license will be inimical to the public safety and welfare. The prohibition against issuance of a license to the offenders shall apply immediately upon receipt of a record of the conviction and the court finding by the secretary, for a period of one year or until discharge from any jail or prison sentence or any period of probation or parole with respect to the offenses specified, whichever date is the later. Receipt by the offender of a certificate of discharge from the department of health and social services or other responsible supervising agency shall, after one year has elapsed since the prohibition began, entitle the holder to apply for an operator's license. The applicant may be required to present the certificate of discharge to the secretary if the latter deems it necessary.

343.30 SUSPENSION AND REVOCATION BY THE COURTS. (2d) A court may suspend or revoke a person's operating privilege upon conviction of any offense specified under ss. 940.225 and 944.12, if the court finds that it is inimical to the public safety and welfare for the offender to have operating privileges. The suspension or revocation shall be for one year or until discharge from prison or jail sentence or probation or parole with respect to the offenses specified, whichever date is later. Receipt of a certificate of discharge from the department of health and social services or other responsible supervising agency, after one year has elapsed since the suspension or revocation, entitles the holder to reinstatement of operating privileges. The holder may be required to present the certificate to the secretary if the secretary deems necessary.

765.03 WHO SHALL NOT MARRY; DIVORCED PERSONS. (1) No marriage shall be contracted while either of the parties has a husband or wife living, nor between persons who are nearer of kin than 2nd cousins except that marriage may be contracted between first cousins where the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating that either party is permanently sterile. Relationship under this section shall be computed by the rule of the civil law, whether the parties to the marriage are of the half or of the whole blood. A

marriage may not be contracted if either party has such want of understanding as renders him or her incapable of assenting to marriage.

939.05 PARTIES TO CRIME. (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although he did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if he:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

939.22 WORDS AND PHRASES DEFINED. (36) "Sexual intercourse" requires only vulvar penetration and does not require emission.

939.32 ATTEMPT. (1) (intro.) Whoever attempts to commit a felony or a battery as defined by s. 940.19 or theft as defined by s. 943.20 may be fined or imprisoned or both not to exceed one-half the maximum penalty for the completed crime; except:

(c) Whoever attempts to commit a crime under ss. 940.42 to 940.45 is subject to the penalty for the completed act, as provided in s. 940.46.

(3) An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

939.50 CLASSIFICATION OF FELONIES. (1) Except as provided in ss. 946.83 and 946.85, felonies in chs. 939 to 948 are classified as follows:

(a) Class A felony.

(b) Class B felony.

(c) Class C felony.

(d) Class D felony.

(e) Class E felony.

(2) A felony is a Class A, B, C, D or E felony when it is so specified in chs. 939 to 948.

(3) Penalties for felonies are as follows:

(a) For a Class A felony, life imprisonment.

(b) For a Class B felony, imprisonment not to exceed 20 years.

(c) For a Class C felony, a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both.

(d) For a Class D felony, a fine not to exceed $10,000 or imprisonment not to exceed 5 years, or both.

(e) For a Class E felony, a fine not to exceed $10,000 or imprisonment not to exceed 2 years, or both.

939.51 CLASSIFICATION OF MISDEMEANORS. (1) Misdemeanors in chs. 939 to 948 are classified as follows:

(a) Class A misdemeanor.

(b) Class B misdemeanor.

(c) Class C misdemeanor.

(2) A misdemeanor is a Class A, B or C misdemeanor when it is so specified in chs. 939 to 948.

(3) Penalties for misdemeanors are as follows:

(a) For a Class A misdemeanor, a fine of not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

(b) For a Class B misdemeanor, a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

(c) For a Class C misdemeanor, a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.

939.74 TIME LIMITATIONS ON PROSECUTIONS. (1) Except as provided in sub. (2), and s. 946.87 (1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

940.203 SEXUAL EXPLOITATION OF CHILDREN. (1) No person may knowingly employ, use, persuade, induce, entice or coerce any child to engage in sexually explicit conduct for the purpose of photographing, filming, videotaping, recording the sounds of or displaying in any way the conduct.

(2) No person may photograph, film, videotape, record the sounds of or display in any way a child engaged in sexually explicit conduct.

(3) No parent, legal guardian or other person exercising temporary or permanent control of a child may knowingly permit, allow or encourage the child to engage in sexually explicit conduct which is filmed, photographed, videotaped, recorded for sound or displayed in any way.

(4) No person may knowingly produce, perform in, profit from, promote, import, reproduce, advertise, sell, distribute, or possess with intent to sell or distribute, any undeveloped film, photographic negative, photograph, motion picture, videotape, sound recording or other reproduction of a child engaging in sexually explicit conduct.

(5) Whoever violates this section is guilty of a Class C felony.

(6) In this section:

(a) "Child" means any person under the age of 18 years.

(b) "Sexually explicit conduct" means actual or simulated:

1. Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;

2. Bestiality;

3. Masturbation;

4. Sexual sadism or sexual masochistic abuse, including but not limited to, flagellation, torture or bondage; or

5. Lewd exhibition of the genitals or pubic area of any person.

940.225 SEXUAL ASSAULT. (1) FIRST DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class B felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(d) Has sexual contact or sexual intercourse with a person 12 years of age or younger.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class C felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(e) Has sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 16 years.

(3) THIRD DEGREE SEXUAL ASSAULT. Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony.

(3m) FOURTH DEGREE SEXUAL ASSAULT. Whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.

(4) CONSENT. "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (1) (d) and (2) (c), (d) and (e). The following persons are presumed incapable of consent

but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(5) DEFINITIONS. In this section:

(a) "Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1).

(b) "Sexual intercourse" includes the meaning assigned under s. 939.22 (36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

(6) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(7) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

944.06 INCEST. Whoever marries or has nonmarital sexual intercourse with a person he or she knows is a blood relative and such relative is in fact related in a degree within which the marriage of the parties is prohibited by the law of this state is guilty of a Class C felony.

944.12 ENTICING A CHILD FOR IMMORAL PURPOSES. Any person 18 years of age or over, who, with intent to commit a crime against sexual morality, persuades or entices any child under 18 years of age into any vehicle, building, room or secluded place is guilty of a Class C felony.

944.15 FORNICATION. (2) Whoever has sexual intercourse in public or whoever has sexual intercourse with a minor who is 16 years old or older but younger than 18 years old and who is not his or her spouse is guilty of a Class A misdemeanor.

944.17 SEXUAL GRATIFICATION. (2) Whoever does any of the following is guilty of a Class A misdemeanor:

(b) Commits an act of sexual gratification with a minor who is 16 years old or older but younger than 18 years old and who is not his or her spouse, involving the sex organ of one person and the mouth or anus of another.

944.20 LEWD AND LASCIVIOUS BEHAVIOR. Whoever does any of the following is guilty of a Class A misdemeanor:

(1) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes a sex organ.

944.21 LEWD, OBSCENE OR INDECENT MATTER, PICTURES AND PERFORMANCES. (1) Whoever intentionally does any of the following is guilty of a Class D felony:

(a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film; or

(b) Advertises, produces or performs in any lewd, obscene or indecent performance; or

(c) Has in his possession, with intent to transfer or exhibit to a person under the age of 18 years, any matter prohibited by this section.

(2) Whoever requires, as a condition to the purchase of periodicals, that a retailer accept material known by the distributor to be lewd, obscene or indecent is guilty of a Class D felony.

944.25 EXPOSING MINORS TO HARMFUL MATERIALS. (1) DEFINITIONS. In this section:

(a) "Harmful material" means:

1. Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, or

2. Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subd. 1, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse, and which, taken as a whole, is harmful to minors.

(b) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

1. Predominantly appeals to the prurient, shameful or morbid interest of minors; and

2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

3. Is utterly without redeeming social importance for minors.

(c) "Knowledge of the minor's age" means:

1. Knowledge or information that the person is a minor, or

2. Reason to know, or a belief or ground for belief which warrants further inspection or inquiry of the age of the minor.

(d) "Knowledge of the nature of the material" means:

1. Knowledge of the character and content of any material described herein, or

2. Knowledge or information that the material described herein has been adjudged to be harmful to minors in a proceeding instituted under sub. (2) or (10), or is the subject of a pending proceeding instituted under sub. (2) or (10).

(e) "Minor" means any person under the age of 18 years.

(f) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(g) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(h) "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(i) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

(j) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(2) COMMENCEMENT OF CIVIL PROCEEDING. Whenever the attorney general or a district attorney has reasonable cause to believe that any person is engaged in selling or exhibiting harmful material to minors, or may become engaged in selling or exhibiting harmful material to minors, the attorney general or the district attorney for the county in which such material is offered for sale or exhibition shall institute an action in the circuit court for that county for adjudication of the question of whether such material is harmful to minors.

(3) FILING AND FORM OF COMPLAINT. The action under sub. (2) shall be commenced by the filing of a complaint to which shall be attached as an exhibit a true copy of the allegedly harmful material. The complaint shall:

(a) Be directed against such material by name or description;

(b) Allege that such material is harmful to minors;

(c) Designate as respondents and list the names and addresses, if known, of any person in this state preparing, selling or commercially distributing or exhibiting such material to minors, or giving away or offering to give away such material to minors, or possessing such material with the apparent intent to sell or commercially distribute or give away or offer to give away such material to minors;

(d) Seek an adjudication that such material is harmful to minors; and

(e) Seek a permanent injunction against any respondent prohibiting him from selling, commercially distributing or exhibiting or giving away such material to minors or from permitting minors to inspect such material.

(4) EXAMINATION BY THE COURT. (a) Upon the filing of the complaint described in sub. (3), the attorney general or the district attorney shall present the same, together with the material attached thereto, as soon as practicable to the court for its examination and reading.

(b) If after such examination and reading the court finds no probable cause to believe such material to be harmful to minors, the court shall cause an endorsement to that effect to be placed and dated upon the complaint and shall thereupon dismiss the action.

(c) If after such examination and reading the court finds probable cause to believe such material to be harmful to minors, the court shall

cause an endorsement to that effect to be placed and dated upon the complaint whereupon it shall be the responsibility of the attorney general or the district attorney, promptly to request the clerk of the court to issue summons and to copy such endorsement upon such number of duplicates of such complaint as are needed for the service of summons, to each copy of which summons shall be attached a copy of such complaint as so endorsed. Service of such summons and endorsed complaint shall be made upon the respondents thereto in any manner provided by law.

(5) APPEARANCE, ANSWER AND TRIAL DATE. (a) On or before the return date specified in the summons issued under sub. (4), or within 15 days after receiving notice of the issuance of such summons, the author, publisher or any person interested in sending or causing to be sent, bringing or causing to be brought, into this state for sale or commercial distribution or exhibition, or any person in this state preparing, selling, exhibiting or commercially distributing, or possessing with intent to sell or commercially distribute or exhibit, the material exhibited to the endorsed complaint, may appear and may intervene as a respondent and file an answer.

(b) If, after service of summons has been effected upon all respondents, no person appears and files an answer on or before the return date specified in the summons, the court may forthwith adjudge whether the material so exhibited to the endorsed complaint is harmful to minors and enter an appropriate final judgment.

(c) Upon the expiration of the time for filing answers by all respondents, the court shall, upon its own motion, or upon the application of any party who has appeared and filed an answer, set a date for the trial of the issues joined.

(6) PUBLIC POLICY, PROCEDURE AND EVIDENCE. (a) The public policy of this state requires that all proceedings prescribed in this section, other than criminal actions under sub. (10), be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of the press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable, except as hereinafter provided, to the trial of the issues framed by the complaint and answers.

(b) Every person appearing and answering shall be entitled, upon request, to a trial of any issue with an advisory jury and the court, with the consent of all parties, may order a trial of any issue with a jury whose verdict shall have the same effect as in cases at law.

(7) JUDGMENT. If the court or jury finds the material exhibited to the complaint not to be harmful to minors, the court shall enter judgment

accordingly and shall dismiss the complaint. If the court or jury finds the material exhibited to the complaint to be harmful to minors, the court shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof, enter a permanent injunction against any respondent prohibiting him from selling, commercially distributing or giving away such material to minors or from permitting minors to inspect such material.

(8) INJUNCTIONS. (a) In any action in which an injunction is sought under this section, any respondent named in the complaint, or any person who becomes a respondent by virtue of intervention under sub. (5), shall be entitled to a trial of the issues within one day after joinder of issue, and a decision shall be rendered by the court or jury within 2 days of the conclusion of the trial. If the issues are being tried before a jury and the jury is not able to render a decision within 2 days of the conclusion of the trial, then notwithstanding any other provision of this section, the jury shall be dismissed and a decision shall be rendered by the court within 2 days of the conclusion of the trial.

(b) No preliminary injunction shall be issued without at least 2 days' notice to the respondents.

(c) If the court, under sub. (4), finds probable cause to believe the exhibited material to be harmful to minors, and so endorses the complaint, the court may, upon the motion of the attorney general or the district attorney, issue a temporary restraining order against any respondent prohibiting him or her from selling, commercially distributing or exhibiting or giving away the material to minors or from permitting minors to inspect the material. No temporary restraining order may be granted without notice to the respondents unless it clearly appears from specific facts shown by affidavit or by the verified complaint that one or more of the respondents are engaged in the sale or exhibition of harmful material to minors and that immediate and irreparable injury to the morals and general welfare of minors in this state will result before notice can be served and a hearing had thereon. Every temporary restraining order shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its own terms within such time after entry, not to exceed 3 days, as the court fixes unless within the time so fixed the respondent against whom the order is directed consents that it may be extended for a longer period. If a restraining order is granted without notice, a motion for a preliminary injunction shall be set down for hearing within 2 days after the granting of the order and shall be given preference. When the motion comes on for hearing, the attorney general or the district attorney shall proceed with the application for a preliminary

injunction and, if he or she does not do so, the court shall dissolve the temporary restraining order.

(9) CONTEMPT. Any respondent, or any officer, agent, servant, employe or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered under sub. (7) or (8), and who disobeys any of the provisions thereof, shall be guilty of contempt of court and upon conviction is guilty of a Class A misdemeanor.

(10) CRIMINAL PROVISIONS CONCERNING REGULAR SALES OF HARMFUL MATERIAL TO MINORS. (a) Subject to par. (b), no person with knowledge of the nature of the material, and with knowledge of the minor's age, may sell, exhibit or loan for monetary consideration to a minor any material which is harmful to minors. Upon conviction thereof such person is guilty of a Class A misdemeanor.

(b) No criminal proceeding shall be commenced against any person pursuant to par. (a) unless, prior to the sale or loan which is the subject of such proceeding, such person:

1. Had written notice from the attorney general or the district attorney that the material which is the subject of such proceeding has been adjudged harmful to minors under sub. (7) or (10), or

2. Has been subject to an order entered under sub. (7) prohibiting such person from selling, commercially distributing or exhibiting or giving away to minors, or from permitting minors to inspect the harmful material which is the subject of such criminal proceeding, or any other harmful material.

(11) DEFENSES AND EXCEPTIONS. No person shall be guilty of contempt under sub. (9) or shall be subject to prosecution under this section:

(a) For any sale or exhibition to a minor where such person had reasonable cause to believe that the minor involved was 18 years old or more, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was 18 years old or more;

(b) For any sale or exhibition where a minor is accompanied by a parent or guardian, or accompanied by an adult and such person has no reason to suspect that the adult accompanying the minor is not the minor's parent or guardian;

(c) Where such person is a bona fide school, museum or public library or is acting in his capacity as an employe of such organization or as a retail outlet affiliated with and serving the educational purposes of such organization.

(12) EXTRADITION. If any person is convicted of contempt under sub. (9) or convicted under sub. (10) and cannot be found in this state, the governor or any person performing the functions of governor by authority of the law, shall, unless such person shall have appealed from the judgment of contempt or conviction and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person is found.

944.32 SOLICITING PROSTITUTES. Whoever intentionally solicits or causes any person to practice prostitution or establishes any person in a place of prostitution is guilty of a Class D felony. If the person is under the age of 18, the defendant is guilty of a Class C felony.

947.15 CONTRIBUTING TO THE DELINQUENCY OF CHILDREN; NEGLECT; NEGLECT CONTRIBUTING TO DEATH. (1) The following persons are guilty of a Class A misdemeanor, and if death is a consequence are guilty of a Class D felony:

(a) Any person 18 or older who intentionally encourages or contributes to the delinquency of any child as defined in s. 48.02 (3m) or the neglect of any child. This subsection includes intentionally encouraging or contributing to an act by a child under the age of 12 which would be a delinquent act if committed by a child 12 years of age or older; or

(b) Any parent, guardian or legal custodian who by neglect, or disregard of the morals, health or welfare of his or her child contributes to the delinquency of that child. This subsection includes neglect or disregard on the part of the parents which results in the commission or probable commission by a child under the age of 12 of an act which would be a delinquent act if committed by a child 12 years of age or older.

(2) An act or failure to act contributes to the delinquency or neglect of a child, although the child does not actually become neglected or delinquent, if the natural and probable consequences of that act or

failure to act would be to cause the child to become delinquent or neglected.

971.37 DEFERRED PROSECUTION PROGRAMS; DOMESTIC ABUSE. (1) In this section, "child sexual abuse" means an alleged violation of s. 940.203, 940.225 or 944.06 if the alleged victim is a minor and the person accused of, or charged with, the violation:

(a) Lives with or has lived with the minor;

(b) Is nearer of kin to the alleged victim than a 2nd cousin;

(c) Is a guardian or legal custodian of the minor; or

(d) Is or appears to be in a position of power or control over the minor.

(1m) (a) The district attorney may enter into a deferred prosecution agreement under this section with a person accused of, or charged with, child sexual abuse or a violation of s. 813.12 (8) or 940.19 (1) or (1m) if the violation constitutes domestic abuse as defined in s. 46.95 (1) (a).

(b) The agreement shall provide that the prosecution will be suspended for a specified period if the person complies with conditions specified in the agreement. The agreement shall be in writing, signed by the district attorney or his or her designee and the person, and shall provide that the person waives his or her right to a speedy trial and that the agreement will toll any applicable civil or criminal statute of limitations during the period of the agreement, and, furthermore, that the person shall file with the district attorney a monthly written report certifying his or her compliance with the conditions specified in the agreement. The district attorney shall provide the spouse of the accused person and the alleged victim or the parent or guardian of the alleged victim with a copy of the agreement.

(2) The written agreement shall be terminated and the prosecution may resume upon written notice by either the person or the district attorney to the other prior to completion of the period of the agreement.

(3) Upon completion of the period of the agreement, if the agreement has not been terminated under sub. (2), the court shall dismiss, with prejudice, any charge or charges against the person in connection with the

crime specified in sub. (1m), or if no such charges have been filed, none may be filed.

(4) Consent to a deferred prosecution under this section is not an admission of guilt and the consent may not be admitted in evidence in a trial for the crime specified in sub. (1m), except if relevant to questions concerning the statute of limitations or lack of speedy trial. No statement relating to the crime, made by the person in connection with any discussions concerning deferred prosecution or to any person involved in a program in which the person must participate as a condition of the agreement, is admissible in a trial for the crime specified in sub. (1m).

(5) This section does not preclude use of deferred prosecution agreements for any alleged violations not subject to this section.